Order for the Courts: Reforming the *Nollan*/*Dolan* Threshold Inquiry for Exactions

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I. INTRODUCTION

For decades prior to 2005,[1] Fifth Amendment regulatory takings jurisprudence languished in a state of confused neglect. Rather than articulating a clearly discernable standard for determining whether a violation of the Takings Clause had occurred, Justices rebuffed government action that seemed to amount to "an out-and-out plan of extortion"[2] and nodded in approval when they deemed the government to have "acted diligently and in good faith"[3] or in furtherance of a "compelling interest."[4] In trying to parse this imprecise thicket, scholars have characterized the Court's approach to regulatory takings as a "muddle,"[5] in "disarray,"[6] and "incoherent."[7] Professor Kent even noted that it is "now axiomatic" that this period of regulatory takings jurisprudence is considered a "constitutional quagmire."[8]

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1. *See infra* Part II.

2. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987) (quoting J.E.D. Assoc., Inc. v. Atkinson, 432 A.2d 12, 14–15 (N.H. 1981)).

3. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 333 (1992).

4. Brown v. Legal Found. of Wash., 538 U.S. 216, 232 (2003) (rejecting a takings challenge to an IOLTA program due to its "dramatic success" in providing legal services to the needy).

5. Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561, 561 (1984).

6. Andrea L. Peterson, *The Taking Clause: In Search of Underlying Principles Part I-A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1299, 1304 (1989).

7. James R. Gordley, *Takings: What Does Matter? A Response to Professor Penalver*, 31 ECOLOGY L.Q. 291, 291 (2004).

8. Michael B. Kent, Jr., *Construing the Canon: An Exegesis of Regulatory Takings Jurisprudence After* Lingle v. Chevron, 16 N.Y.U. ENVTL. L.J. 63, 64 (2008) (quoting Mark W. Cordes, *Takings Jurisprudence as Three-Tiered Review*, 20 J. NAT. RESOURCES & ENVTL L. J. 1 (2006)).

During this period of inexactitude, the Court relied upon the formula it had articulated in *Agins v. City of Tiburon*[9] to determine if a regulatory taking had occurred. Under *Agins*, a taking may occur if regulation "does not substantially advance legitimate state interests."[10]

It was under the *Agins* regime that the Court decided *Nollan v. California Coastal Commission*[11] and *Dolan v. City of Tigard*,[12] twin decisions that constitute the entirety of the Court's evaluation of exactions of any type. An exaction is a condition that the government places upon a property owner in exchange for permission to develop his land—typically, an exaction requires that a landowner dedicate either money or property to public use to offset the increased burden of development.[13] Combined, *Nollan* and *Dolan* mandate that a regulation is not a taking only if there is an "essential nexus"[14] between the exaction and the impact caused by the proposed development, and the exaction is "rough[ly] proportional"[15] to the development's impact. When *Nollan* and *Dolan* were decided in 1987 and 1994, respectively, it was presumed that they extended the *Agins* "substantial advancement" formulation. With only two exactions cases to assist them, however, lower courts had difficulty applying *Nollan* and *Dolan* with consistency. Particularly stringent disagreement arose as to what types of exactions the *Nollan*/*Dolan* standard properly applied to. The *Nollan* and *Dolan* cases concerned adjudicatively imposed exactions—that is, conditions imposed upon development on an ad hoc, case-by-case basis.[16] Without further guidance, some lower courts elected to apply *Nollan* and *Dolan* to legislative[17] and

9. 447 U.S. 255 (1980) (holding that restrictive rezoning of appellants' property substantially advanced legitimate state goals by preserving open-space land in urban areas).

10. *Id*. at 260.

11. 483 U.S. 825 (1987).

12. 512 U.S. 374 (1994).

13. For example, an exaction could require that a massive residential development include land dedicated to parks or recreation to offset the confiscation of open green space. Also, a retail development could be required to pay for the reconfiguration of a nearby intersection to mitigate increased traffic flow.

14. *Nollan,* 483 U.S. at 837.

15. *Dolan,* 512 U.S. at 391.

16. Adjudicatively imposed exactions are typically levied by administrative bodies, such as municipal planning commissions, and are frequently assessed to comport with state or municipal statutory requirements. In *Dolan*, for instance, the City of Tigard's City Planning Commission made an individualized determination that the petitioner dedicate roughly seven thousand square feet of her proposed development to a pedestrian and bicycle pathway. *Id.* at 380. The Commission assessed the exaction to comply with square foot limitations for paving and structures included in Tigard's Community Development Code (CDC). *Id.* at 377–78. The CDC itself had been promulgated at the behest of a comprehensive land use management program enacted by the Oregon legislature. *Id.* at 377.

17. One example of a legislative exaction is the City of Scottsdale's decision to impose a water resources development fee as a condition on all new development. Home Builders Ass'n of Cent.

monetary exactions as well, while others declined and chose to utilize alternative tests.[18]

The confusion in applying its takings jurisprudence did not go unnoticed by the Court. When it decided *Lingle v. Chevron U.S.A., Inc.*[19] in 2005, the Court wryly noted that "our regulatory takings jurisprudence cannot be characterized as unified."[20] The Court took the opportunity in *Lingle* to resurvey its takings jurisprudence, reaching all the way back to its 1922 decision in *Pennsylvania Coal Co. v. Mahon*.[21] Though *Lingle* itself was not an exactions case, it nonetheless considered the entirety of takings jurisprudence and discussed *Nollan* and *Dolan* at length.[22] In reconsidering and streamlining its takings jurisprudence, the Court whittled decisively away at the very underpinnings of that body of law: that, per *Agins*, a taking cannot be effected if the regulation substantially advances a legitimate state interest.[23] The Court rejected the *Agins* language due to its limited ability to "help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property."[24] Instead, *Lingle* re-characterized *Nollan* and *Dolan*—and, therefore, evaluations of exactions—as an application of the doctrine of unconstitutional conditions.[25] That doctrine dictates that "the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property."[26]

This Comment argues that the Court's recalibrated view of *Nollan* and *Dolan* as applications of the doctrine of unconstitutional conditions

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Ariz. v. City of Scottsdale, 930 P.2d 993, 994 (Ariz. 1997). In order to construct a sustainable water supply infrastructure, which would balance the amount of water pumped out of and restored to the area's aquifers, Scottsdale's city council adopted an ordinance that levied a fee of $1,000 per single family residence, $600 per apartment unit, and $2,000 per acre foot of estimated water usage for other new uses. *Id.* at 995. The fees constituted an exaction because they contributed to the capital necessary to build a water system that would offset the burden of new development. *Id.* at 994–95.

18. *See, e.g.*, Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale, 902 P.2d 1347 (Ariz. Ct. App. 1995) (declining to apply Nollan/Dolan analysis because *Dolan* involved an adjudicative, rather than legislative, exaction).

19. 544 U.S. 528 (2005).

20. *Id*. at 539. "This is, to say the least, an understatement." James S. Burling & Graham Owen, *The Implications of* Lingle *on Inclusionary Zoning and Other Legislative and Monetary Exactions*, 28 STAN. ENVTL. L.J. 397, 399 n.5 (2009).

21. 260 U.S. 393 (1922).

22. *Lingle*, 544 U.S. at 546–48.

23. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

24. *Lingle*, 544 U.S. at 529.

25. *Id*. at 530.

26. *Id*. at 547.

suggests that nexus and proportionality standards should be applied to both legislatively and adjudicatively imposed exactions. Part II discusses the pre-*Lingle* state of exactions analysis and the debate regarding the appropriate level of scrutiny to apply to different types of exactions. Part III reviews the *Lingle* decision itself and its determination that *Nollan* and *Dolan* are based upon the doctrine of unconstitutional conditions. Part IV proposes a balancing test to resolve the difficult threshold inquiry of whether an exaction should be examined under heightened scrutiny. Part V revisits the Ninth Circuit's holding in *McClung v. City of Sumner* that legislative exactions are outside of the *Nollan*/*Dolan* framework,[27] applying the balancing test in lieu of a formalistic determination.

II. EXACTIONS IN THE PRE-*LINGLE* WORLD

The proposition that a government regulation may violate the Takings Clause of the Fifth Amendment if it "goes too far" has existed since the Court's 1922 opinion in *Pennsylvania Coal Co. v. Mahon*.[28] In *Mahon*, Justice Holmes acknowledged that "government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change," but noted concurrently that "when [a regulation] reaches a certain magnitude . . . there must be an exercise of eminent domain and compensation to sustain the act."[29] Holmes added, a bit unhelpfully, that "the question depends upon the particular facts."[30] In a subsequent decision, *Armstrong v. United States*, the Court articulated the rationale behind its takings jurisprudence as an interest in "bar[ring] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[31] But Holmes's "too far" phrasing from *Mahon*,[32] even in conjunction with the rationale stated in *Armstrong*, created an imprecise standard that scholars criticized as a "we know it when we see it" scheme.[33] This vagueness occasioned a procession of tests that were "created, used, and discarded"[34] in an effort to create a more comprehensible takings standard.

The Court's reluctance to enunciate bright-line rules to guide regulatory takings analysis led to the creation of four alternative tests that

27. McClung v. City of Sumner, 548 F.3d 1219, 1227–28 (9th Cir. 2008).

28. 260 U.S. 393, 415 (1922).

29. *Id*. at 413.

30. *Id*.

31. Armstrong v. United States, 364 U.S. 40, 49 (1960).

32. *Mahon*, 260 U.S. at 415.

33. Burling & Owen, *supra* note 20, at 402 (citing Jacobellis v. Ohio, 378 U.S. 184, 188 (1964)).

34. *Id*.

endure today. In *Pennsylvania Central Transportation v. City of New York*, the Court announced a deferential test that determines whether a regulation goes "too far" based upon a balancing of three factors: the economic impact of the regulation, the interference with the property owner's investment-backed expectations, and the character of the regulation.[35] The *Penn Central* test is considered to be the most deferential of the four.[36] The remaining three tests each subject the challenged government action to higher scrutiny. In *Loretto v. Teleprompter Manhattan CATV Corp*., the Court held that a regulation mandating a physical invasion of privacy, regardless of the size of the invasion, constitutes a taking.[37] The Court announced another categorical taking in *Lucas v. South Carolina Coastal Council*, which held that any regulation that strips property of all economically viable use effects a taking.[38] Lastly, the combined *Nollan*/*Dolan* standard enjoins the government from requiring that a landowner dedicate property to public use in exchange for a development permit unless the government is able to demonstrate that there is an essential nexus between the development's impact and the dedication, and that the dedication is proportional to that impact.[39]

In *Nollan v. California Coastal Commission*, property owners challenged the Commission's practice of requiring landowners to trade exclusive access to the beachfront portion of their property for building permits.[40] The Nollans had sought permission to demolish their one-story bungalow and replace it with a two-story house.[41] The Commission would grant the requisite permit only if the Nollans agreed to dedicate to public use the roughly one-third of the property that ran parallel to the ocean.[42] It justified the requirement as a mechanism for offsetting the loss of ocean visibility to travelers on Highway 1, which ran behind the Nollans' property, that would result if the height of the residence was increased.[43] The Commission described the diminished visibility as a "psychological barrier."[44]

The Court, conversely, considered the Commission's scheme an "out-and-out plan of extortion."[45] It rejected the Commission's demand

35. Pa. Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

36. Burling & Owen, *supra* note 20, at 403.

37. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

38. Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

39. Nollan v. Cal. Coastal Comm'n, 438 U.S. 825, 837 (1987); Dolan v. City of Tigard, 512 U.S. 374, 371 (1994).

40. *Nollan*, 483 U.S. at 827–28.

41. *Id*. at 828.

42. *Id*.

43. *Id*. at 838.

44. *Id*.

45. *Id*. at 837 (quoting J.E.D. Assoc., Inc. v. Atkinson, 432 A.2d 12, 14–15 (N.H. 1981)).

and announced that conditions of this nature are permissible only if certain conditions are present. First, the impact of the proposed development must, in and of itself, be sufficient to merit refusing the building permit—a refusal that would not itself effect a taking.[46] Second, as an alternative to flatly denying the building permit, a condition to granting the desired permit may be imposed that mitigates the adverse impact that would have justified denying the permit.[47] In other words, there must be a nexus between the objectionable impact of a development and the exaction demanded of the landowner. In this case, the Court rejected the dedication demand on the ground that it bore no relationship to the loss of coastal views; the dedication would facilitate public beach access but would in no way improve visibility from the highway.[48] "Constitutional propriety disappears," the Court declared, "if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition."[49]

The Court augmented the nexus requirement it created in *Nollan* when it decided *Dolan v. City of Tigard.* In *Dolan*, the owner of a hardware and plumbing store sought a permit to expand the size of the shop.[50] The City of Tigard agreed to grant the permit only on the condition that the landowner dedicate a swath of the business's land to public access and construct a bicycle trail on it with the stated goal of mitigating the anticipated increase in traffic attributable to the expansion.[51] Though the Court conceded that, per *Nollan*, a nexus did exist between the impact of the proposed development and the exaction demanded by the City, it rebuffed the exaction as lacking proportionality to the adverse impact.[52] The Court held that in addition to a showing of a nexus, the government "must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[53] Because the City could offer only vague, speculative estimates about how much the required dedication would reduce

46. *Id*. at 836–37.

47. *Id*.

48. The Court only briefly discussed the issue of whether refusing the Nollans a building permit due to obstructed views from the highway would constitute a taking: "We assume, without deciding . . . [that] the Commission unquestionably would be able to deny the Nollans their permit outright if their new house . . . would substantially impede [ocean views], unless the denial would interfere so drastically with the Nollans' use of their property as to constitute a taking." *Id.* at 835–36.

49. *Id*. at 837.

50. Dolan v. City of Tigard, 512 U.S. 374, 379–80 (1994).

51. *Id*. at 381–82.

52. *Id*. at 391.

53. *Id*.

traffic congestion, it could not demonstrate that the dedication was proportional to the development's impact.[54]

Though the combined *Nollan*/*Dolan* requirements have been recognized by lower courts as a "heightened scrutiny" standard for exactions,[55] the Supreme Court has provided no guidance for determining whether legislatively imposed exactions should be subjected to this level of scrutiny, or whether it should be reserved only for exactions imposed on an ad hoc basis. Given this absence of any indication, lower courts can make that determination only by examining the rationales that the Court has supplied for exactions jurisprudence. In both *Nollan* and *Dolan*, the Court provided some indication that its exactions tests were designed to further the *Agins* takings standard of a substantial advancement of a legitimate state interest. Indeed, in *Nollan* the Court seemed to predicate the entire development of the nexus requirement upon a desire to clarify the *Agins* standard. Justice Scalia, writing for the majority, notes early in his opinion that the Court's decisions "have not elaborated on the standards for determining what constitutes a 'legitimate state interest' or what type of connection between the regulation and the state interest satisfied the requirement that the former 'substantially advance' the latter."[56] Similarly, Chief Justice Rehnquist points out early in his majority opinion in *Dolan* that *Agins* finds that a regulation does not effect a taking if the regulation not only substantially advances a legitimate state interest, but also does not deny an owner economically viable use of his land.[57] Chief Justice Rehnquist then quickly notes that the exaction imposed in *Dolan* in no way deprives the hardware store owner of the viable use of her land, and proceeds to tether the subsequent analysis to the "substantially advance" prong of *Agins*.[58] The Court's repeated desire, prior to *Lingle*, to create exactions jurisprudence that comports with the *Agins* substantial advancement standard suggests that legislatively imposed exactions should be eligible for the heightened scrutiny of the *Nollan*/*Dolan* nexus and proportionality requirements. If a legislatively imposed exaction that effected the same requirement as those discussed in *Nollan* and *Dolan*—namely, that property owners give up property in exchange for a permit—was upheld under a more relaxed scrutiny, then the permissibility

54. "[T]he city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by petitioner's development reasonably relate to the city's requirement for a dedication . . . The city simply found that the creation of the pathway 'could offset some of the traffic demand . . . and lessen the increase in traffic congestion.'" *Id.* at 395 (citation omitted).

55. *See, e.g.*, Ehrlich v. City of Culver City, 911 P.2d 429, 443 (Cal. 1996).

56. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834 (1987).

57. *Dolan*, 512 U.S. at 385.

58. *Id.*

of an exaction would depend not upon its adherence to the *Agins* standard, but upon the mechanism used to impose it.

The argument that the Court intended exactions that require property to be relinquished to be eligible for analysis under heightened scrutiny is supported by the fact that, in *Dolan*, Chief Justice Rehnquist distinguishes only legislatively imposed exactions that "classif[y] entire areas of [a] city,"[59] suggesting that the *Nollan*/*Dolan* analysis should be applied to more acute legislative exactions. Additionally, Burling and Owen note that although advocates of a more relaxed scrutiny for legislative exactions point to footnote eight of *Dolan* to support the claim that the Court intended such exactions to be spared heightened scrutiny, that footnote's language is qualified.[60] Footnote eight distinguishes between "most generally applicable zoning conditions" and adjudicatively imposed exactions, noting that when evaluating the former, "the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights."[61] However, the inclusion of the word "most" implies that the Court "anticipated heightened review for at least some types of generally applicable legislation."[62] Burling and Owen reasonably venture that the Court intended to reserve heightened scrutiny for legislative exactions that impose the same types of exactions as the adjudicatively imposed ones in *Nollan* and *Dolan*.[63] Additionally, footnote eight cites *Village of Euclid v. Ambler Realty Company*[64] to support its characterization of general zoning regulations. That case, though, did not involve the imposition of an exaction, and the legislation was met with a Fourteenth Amendment due process challenge rather than a Fifth Amendment takings one.[65]

III. *LINGLE* AND THE NEW BASIS FOR *NOLLAN* AND *DOLAN*

In *Lingle v. Chevron U.S.A., Inc.*,[66] a unanimous Supreme Court declared that although the "substantially advances" language "has been ensconced in our Fifth Amendment takings jurisprudence,"[67] the time had arrived for it to be dislodged.

In *Lingle*, the Hawaii Legislature's June 1997 enactment of Act 257 limited the amount of rent that oil companies could charge lessee-dealers

59. *Id*.
60. Burling & Owen, *supra* note 20, at 406.
61. *Dolan*, 512 U.S. at 385 n.8.
62. Burling & Owen, *supra* note 20, at 406.
63. *Id.*
64. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).
65. *Id*. at 384.
66. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005).
67. *Id.* at 531–32.

that operated roughly 150 Hawaiian gas stations owned directly by oil companies.[68] In response, Chevron sued the state's Governor and Attorney General on several grounds, including that the rent cap constituted a taking of Chevron's property.[69] During procedural wrangling, the parties agreed that Act 257 reduced the amount of rent that Chevron would be allowed to charge eleven of its sixty-four lessee-dealer stations by $207,000 per year, although the cap would theoretically enable Chevron to charge the remaining fifty-three lessee-dealer stations more rent than it otherwise would, for a net increase of rental revenue amongst all 64 stations of $1.1 million per year.[70]

The district court granted Chevron's motion for summary judgment on the ground that "Act 257 fails to substantially advance a legitimate state interest, and as such, effects an unconstitutional taking."[71] Though the district court conceded that the Act's stated goal of preventing concentration of the retail gasoline market and suppressing high prices was a legitimate state interest, it concluded that the Act would not actually effect a reduction of lessee-dealers' costs or retail prices.[72] After initially vacating the grant of summary judgment and remanding the case for further determination of fact as to whether the Act would benefit consumers,[73] the Ninth Circuit ultimately affirmed summary judgment, concurring with the district court that the Act effected an unconstitutional taking for failure to advance a legitimate state interest.[74]

When the case reached the Supreme Court, Justice O'Connor, writing for the majority, began her analysis by attempting to situate *Agins* within the contemporary takings jurisprudence. She noted the per se takings tests enunciated in *Loretto v. Teleprompter Manhattan*[75] and *Lucas v. South Carolina Coastal Council,*[76] labeling them, as well as exactions,

68. *Id*. at 532–33. At the time *Lingle* was decided, roughly 300 service stations sold gasoline in the State of Hawaii. *Id.* Roughly half were operated through arrangements wherein an oil company would buy or lease land from a third party, build a service station, and then lease the station to a dealer. *Id.* The majority of Chevron's Hawaiian gasoline sales were conducted at sixty-four stations operated in this manner. *Id.* Rent would be determined as a percentage of the dealer's margin on sales. *Id.* Act 257 limited rent to fifteen percent of a dealer's gross profits from gasoline sales plus fifteen percent of gross sales from other products. *Id*. at 533.

69. *Id*.

70. *Id*. at 534.

71. *Id*. (quoting Chevron U.S.A., Inc. v. Cayetano, 57 F. Supp. 2d 1003, 1014 (D. Haw. 1998)).

72. *Chevron U.S.A., Inc.*, 57 F. Supp. 2d at 1010.

73. Chevron U.S.A., Inc. v. Cayetano, 224 F.3d 1030, 1042 (9th Cir. 2000).

74. Chevron U.S.A., Inc. v. Cayetano, 363 F.3d 846, 848 (9th Cir. 2004).

75. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

76. Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

as "relatively narrow categories."[77] When neither of the per se takings tests apply, a regulatory taking should be evaluated under the *Penn Central* framework, focusing on the economic impact of the regulation, interference with investment-backed expectations, and the character[78] of the regulation.[79] *Agins*, decided two years after *Penn* and before *Lucas* and *Loretto*, declared that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land."[80] Justice O'Connor takes special notice of the disjunctive language in *Agins*, which she asserts has allowed its "substantially advances" language to be read "to announce a stand-alone regulatory takings test that is wholly independent of *Penn Central* or any other test."[81] Indeed, both the Ninth Circuit and the district court relied solely upon the "substantially advances" prong of the *Agins* formulation to strike down Act 257, indicating that *Agins* has been used in practice not merely as a theoretical rationale for regulatory takings tests such as *Penn Central* and the per se tests of *Loretto* and *Lucas*, but as a discrete test of its own.[82]

Prior to *Lingle*, the Court never had occasion to consider the validity of *Agins* "as a freestanding takings test."[83] Presented with the opportunity, the Court quickly and in no uncertain terms posits that the "substantially advances" formula in *Agins* was developed in reliance upon due process rather than takings jurisprudence.[84] Justice O'Connor points out that to support its creation of the "substantially advances" language, the Court cited *Nectow v. Cambridge*[85] and *Village of Euclid v. Ambler Realty Company,*[86] which both involved zoning ordinances challenged on due process grounds.[87] The "substantially advances" formulation mimics

77. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 528, 538 (2005). Justice O'Connor reserves discussion of *Nollan* and *Dolan* and the "special context" of land-use exactions for later in her opinion.

78. Justice O'Connor points to "whether [the regulation] amounts to a physical invasion or instead merely affects property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good'" as an example of relevant "character." *Id*. at 539 (quoting Pa. Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)).

79. *Id.* at 538.

80. *Id*. at 540 (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980); *Pa. Cent.,* 438 U.S. at 138 n.6).

81. *Id*.

82. *Id.* ("[T]he lower courts in this case struck down Hawaii's rent control statute based solely upon their findings that it does not substantially advance a legitimate state interest.").

83. *Id*.

84. *Id*.

85. 277 U.S. 183 (1928).

86. 272 U.S. 365 (1926).

87. *Lingle*, 544 U.S. at 540–41.

the holding in *Euclid*, quoted in *Nectow*, "that a municipal zoning ordinance would survive a substantive due process challenge so long as it was not 'clearly arbitrary and unreasonable, having *no substantial relation to the public health, safety, morals, or general welfare*.'"[88]

Though the Court ultimately derides earlier reliance upon due process jurisprudence in developing the *Agins* formulation as "regrettably imprecise,"[89] it nonetheless finds this reliance understandable given that *Agins* was the first case presented to the Court in decades involving a challenge to zoning regulations; it was logical for the Court to "turn to these seminal zoning precedents for guidance."[90] Additionally, when *Agins* was decided, the distinction between takings jurisprudence and due process had been blurred by the Court's tendency to "refe[r] to deprivations of property without due process of law as 'takings.'"[91] Also, the Court had not by that time clarified whether regulatory takings claims were cognizable under the Takings Clause or the Due Process Clause.[92]

The Court also takes issue with what it considers to be a "means–end test" rather than one that evaluates the extent of the imposition upon private-property rights.[93] The "substantially advances" language in *Agins*, rather than inquiring into the "magnitude or character of the burden" represented by a regulation, asks instead only about the regulation's efficacy in furthering a legitimate state interest.[94] In this sense, the *Agins* formulation is distinguished from the aforementioned *Loretto*, *Lucas*, and *Penn Central* tests, and it does not accurately assess whether private property has been taken in violation of the Fifth Amendment.[95]

Non-doctrinal considerations also contribute to the Court's determination to dislodge *Agins* from the regulatory takings regime. As a means–end test, the "substantially advances" language would require lower courts to evaluate the effectiveness of a panoply of statutes, which is a task that the Court feels would allow "courts to substitute their pre-

88. *Id.* at 541 (quoting Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926)).

89. *Id*. at 542.

90. *Id*. at 541.

91. *Id*. (citing Rowan v. Post Office Dept., 397 U.S. 728, 740 (1970)).

92. *Id*. at 541–42 (citing Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 197–99 (1985)).

93. *Id*. at 542–43.

94. *Id*.

95. *Id.* at 542. The Court again notes that the *Agins* standard is more akin to a due process evaluation than a proper takings one. *Id.* It fails to consider how the regulatory burden is distributed amongst property owners, which the Court has noted is an integral policy rationale supporting takings jurisprudence. *Id*.; Armstrong v. United States, 364 U.S. 40 (1960). In *Armstrong*, the Court wrote that "bar[ring] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" is a foundational justification for the takings regime. *Armstrong*, 364 U.S. at 49.

dictive judgments for those of elected legislatures and expert agencies."[96] As an illustration of the cumbersome nature of this proposition, the Court points to *Lingle* itself.[97] In considering the challenge to Act 257, lower courts were presented with testimony from multiple reputable economists who presented conflicting opinions as to whether Act 257 would indeed help prevent concentration and inflated gasoline prices.[98] By forcing lower courts to second-guess acts of the legislature, the language in Agins compelled courts to perform not only a role to which they are ill-suited, but one that withholds the deference due to legislatures by the judiciary.[99]

After the Court discards *Agins* as a means of evaluating regulatory takings, it proceeds in its wholesale reevaluation of takings jurisprudence to a juncture crucial for the purposes of this Comment. The Court vigorously maintains—perhaps dubiously—that its determination regarding *Agins* "does not require [it] to disturb any of [its] prior holdings."[100] It heaps special attention upon *Nollan* and *Dolan*, conceding that although those cases incorporated the *Agins* language, they did not rely upon the "substantially advances" test to support their holdings.[101] Instead, the Court maintains that *Nollan* and *Dolan* are "special application[s]" of the doctrine of unconstitutional conditions, which is mentioned only in passing in both decisions.[102] The Court uses the occasion of *Lingle* to declare that the doctrine of unconstitutional conditions, which holds that "the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property,"[103] is not a new rationale for *Nollan* and *Dolan*, but was, unbeknownst to most, the justification for them all along.[104]

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96. *Lingle*, 544 U.S. at 544.

97. *Id.* at 544–45 ("[T]he District Court was required to choose between the views of two opposing economists as to whether Hawaii's rent control statute would help to prevent concentration . . . . The reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established.").

98. *Id*.

99. *Id*. at 545. "The reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established, and we think they are no less applicable here." *Id*.

100. *Id*.

101. *Id.* at 547 ("Although *Nollan* and *Dolan* quoted *Agins*' language, the rule those decisions established is entirely distinct from the "substantially advances" test we address today.").

102. *Id.*

103. Dolan v. City of Tigard, 512 U.S. 374, 385 (1987).

104. *Lingle*, 544 U.S. at 547–48.

IV. *LINGLE* AND THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS SUPPORT MAKING LEGISLATIVELY DETERMINED EXACTIONS ELIGIBLE FOR *NOLLAN* AND *DOLAN* HEIGHTENED SCRUTINY

Burling and Owen succinctly describe the doctrine of unconstitutional conditions as pertaining to exchanges in which "the government gives a benefit to a person in exchange for something from the owner of which the government would not ordinarily be entitled."[105] In the case of land-use exactions, the pertinent exchange involves a property owner's forfeiture of his Fifth Amendment right to be compensated for a taking of his property and the government's subsequent relinquishment of the building permit sought.[106]

The *Lingle* Court's substitution of the doctrine of unconstitutional conditions for the *Agins* "substantially advances" formula, and the reasons given for the substitution, help illuminate exactly why it is improper to exclude legislatively determined exactions from eligibility for *Nollan* and *Dolan* analysis. Justice O'Connor cites[107] a much-referenced formulation of the underlying goal of the Takings Clause, which was first articulated in *Armstrong v. United States*.[108] The *Armstrong* formulation notes that the regime of takings jurisprudence aims not to "prohibit the taking of private property,"[109] but to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[110] Takings jurisprudence, therefore, is a centrally distributive inquiry; compensation is occasioned when a property owner is asked to bear a regulatory burden that his neighbor should rightfully share.

A concern for distribution of the burden posed by regulation must therefore undergird any evaluation of regulatory takings. Relying upon the *Agins* "substantially advances" language to inform whether a regulation effects a taking omits an inquiry into the distribution or extent of the regulation. As Justice O'Connor notes, "the 'substantially advances' inquiry reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights. Nor does it provide any information about how any regulatory burden is *distributed* among property owners."[111] Instead of properly focusing upon the distribution of the burden, the *Agins* language asks only whether the regula-

105. Burling & Owen, *supra* note 20, at 410.

106. *See supra* text accompanying note 103.

107. *Lingle*, 544 U.S. at 537.

108. 364 U.S. 40 (1960).

109. *Lingle*, 544 U.S. at 536 (quoting First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles, 482 U.S. 304, 314 (1987)).

110. *Armstrong*, 364 U.S. at 49.

111. *Lingle*, 544 U.S. at 542.

tion is effective in advancing a state interest.[112] This inquiry does not necessarily reveal anything about burden distribution, as "[t]he owners of a property subject to a regulation that *effectively* serves a legitimate state interest may be just as singled out and just as burdened as the owner of a property subject to an *ineffective* regulation."[113] Consequently, the reliance upon *Agins* "misses the point."[114]

What *Lingle* calls for, then, is a regime of takings analysis that incorporates the factors that O'Connor finds lacking in the *Agins* language:[115] the magnitude and character of the burden caused by a particular piece of land-use regulation. The legislative/adjudicative distinction introduced by the Court in *Dolan*[116]—and which "gave little guidance as to its theoretical purpose"[117]—has led to differing interpretations by lower courts[118] of the distinction's "operative significance."[119]

A number of courts have held, based on the legislative/adjudicative distinction referenced in *Dolan*,[120] that the *Nollan*/*Dolan* scrutiny should not be applied to exactions that have been imposed legislatively. In *Home Builders Association of Dayton and the Miami Valley v. City of Beavercreek*, the Supreme Court of Ohio found that because *Nollan* and *Dolan* "dealt with [ad hoc] land use exactions that forced property owners to dedicate a certain portion of their land to public use," exactions implemented legislatively should not be subject to the same evaluation.[121] The courts that adopt this approach typically cite a concern for a heightened risk of extortion as the reason for observing the distinction.[122] Christopher T. Goodin provides a helpful summary of this rationale in

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112. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) ("The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests.").

113. *Lingle*, 544 U.S. at 543 (emphasis in original).

114. Matthew Baker, *Much Ado About* Nollan/Dolan*: The Comparative Nature of the Legislative-Adjudicative Distinction in Exactions*, 42 URB. LAW. 171, 191 (2010).

115. *Lingle*, 544 U.S. at 542.

116. Dolan v. City of Tigard, 512 U.S. 374, 385 (1994).

> The sort of land use regulations discussed in the cases just cited, however, differ in two relevant particulars from the present case. First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city.

Id.

117. Baker, *supra* note 114, at 177.

118. *See infra* Part I.

119. Baker, *supra* note 114, at 177.

120. *Dolan*, 512 U.S. at 385.

121. Home Builders Ass'n v. City of Beavercreek, 729 N.E.2d 349, 355 (Ohio 2000).

122. Baker, *supra* note 114, at 179.

his analysis of the California Supreme Court's frequently referenced decision in *Ehrlich v. City of Culver City*:[123]

> [F]irst, *Dolan* is triggered by cases "exhibiting circumstances which increase the risk that the local permitting authority will seek to avoid the obligation to pay just compensation." Second, such circumstances are present chiefly in the discretionary context, which "presents an inherent and heightened risk that local government will manipulate the police power to impose conditions unrelated to legitimate land use regulatory ends, thereby avoiding what would otherwise be an obligation to pay just compensation." Third, that type of manipulation was not present in ministerial, "legislatively formulated," "broadly applicable fees," which are thus subject to a lesser standard of scrutiny.[124]

Courts adopting this formalistic approach also express concern for deference to legislative bodies in addition to extortion imposed through ad hoc mechanisms.[125]

Conversely, other courts have opted to apply the *Nollan*/*Dolan* analysis to legislatively imposed exactions as well as ad hoc ones.[126] Still, other courts incorporate the legislative origin of an exaction as one factor for consideration when determining whether to apply heightened scrutiny or a *Penn Central* analysis.[127] These courts place diminished emphasis on the source of burden, focusing instead on the character and nature of an imposition. Another factor considered by courts that opt not to observe the formalistic approach is the "degree of discretion possessed or exercised by the body imposing the exaction."[128] Also, courts adopting this approach tend to voice concern about the potential for legislatures to "'gang up' on particular groups to force extractions that a majority of

123. *See* Ehrlich v. City of Culver City, 911 P.2d 429 (Cal. 1996).

124. Christopher T. Goodwin, Comment, Dolan v. City of Tigard *and the Distinction Between Administrative and Legislative Exactions: "A Distinction Without a Constitutional Difference,"* 28 U. HAW. L. REV. 139, 151 (citations to *Ehrlich* omitted).

125. *See, e.g.*, Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale, 930 P.2d 993, 996 (Ariz. 1997) ("Development or impact fees are presumed valid as exercises by legislative bodies of the power to regulate land use."); *Ehrlich*, 911 P.2d at 459 ("*Nollan* and *Dolan* in most cases impose no *additional* constitutional burden on the government to justify development fees beyond the burden it already bears under the state constitution and statute.").

126. *See, e.g.*, Amoco Oil Co. v. Vill. of Schaumburg, 661 N.E.2d 380 (Ill. App. Ct. 1995); Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620 (Tex. 2004).

127. *See, e.g.*, Curtis v. Town of S. Thomaston, 708 A.2d 657 (Me. 1998). "[I]nquiry into rough proportionality does not end at this legislative determination, but we assign weight to the fact that the easement requirement derives from a legislative rule of general applicability and not an ad hoc determination." *Id.* at 660.

128. Baker, *supra* note 114, at 180.

constituents would not only tolerate but applaud,"[129] with the protection of reduced scrutiny due to the legislative nature of the exactions.

The abundance of divergent jurisprudence in applying the legislative/adjudicative distinction has created a morass that begs for revision. Critics and scholars are virtually uniform in a call for a more workable standard for applying *Nollan* and *Dolan* analyses.[130] The form of the proposed revisions, however, varies considerably. Some observers propose applying heightened scrutiny to all exactions, regardless of origin.[131] Others propose either modifying the *Nollan*/*Dolan* test itself[132] or adopting a new test for when application of heightened scrutiny should be triggered.[133]

Additionally, the Court's "special application"[134] of the doctrine of unconstitutional conditions in *Nollan* and *Dolan* impliedly supports a test that allows legislatively imposed exactions to be evaluated under heightened scrutiny. Though critics argue that the unconstitutional conditions doctrine applies to all exactions, legislative and adjudicative alike,[135] the brief section of *Lingle* that addresses *Nollan*/*Dolan* and the doctrine of

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129. *Flower Mound*, 135 S.W.3d at 641.

130. *See, e.g.*, Joshua P. Borden, *Derailing* Penn Central*: A Post-*Lingle*, Cost-Basis Approach to Regulatory Takings*, 78 GEO. WASH. L. REV. 870, 871 (2010) ("[T]he Court's current method of regulatory takings analysis is fraught with so many issues that one cannot help but believe that a better, sounder, approach must exist."); Richard A. Epstein, *How to Solve (or Avoid) the Exactions Problem*, 72 MO. L. REV 973, 992 (2007) ("The only way that we can solve the exaction problems created by current Supreme Court doctrine is to junk the anemic constitutional definitions of private property tied to possession in favor of the more robust system of property rights.").

131. *See, e.g.*, J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied* Nollan *and* Dolan *and Where They Should Go From Here*, 59 WASH. & LEE L. REV. 373, 376 (2002) ("[C]ourts should apply the . . . test equally to all land use conditions."); Steven A. Haskins, *Closing the* Dolan *Deal–Bridging the Legislative/Adjudicative Divide*, 38 URB. LAW. 487, 491 (2006) ("Applying the *Dolan* test to all exactions will provide a proper constitutional framework to gird the exactions process, providing the foundation on which landowners and governments can work together.").

132. *See, e.g.*, Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 WM. & MARY L. REV. 1513, 1521 (2006) (proposing a modification of *Nollan* and *Dolan* that would require "courts . . . to inquire whether the exaction program in question is underinclusive, that is, whether owners who are similarly situated to the plaintiff owner are required to provide similar exactions").

133. Jane C. Needleman, *Exactions: Exploring Exactly When* Nollan *and* Dolan *Should be Triggered*, 28 CARDOZO L. REV. 1563, 1565 (2006) (proposing that "the *Nollan*/*Dolan* analysis should be triggered by judicial challenges to conditions that local municipalities place on development permits when the actual exaction imposed could not otherwise be acquired by the municipality outside the development permit context").

134. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 547 (2005).

135. *See* Breemer, *supra* note 131, at 401–02 ("[C]ourts should not limit the essential nexus test to administrative exactions because no distinction between legislative and administrative conditions exists in unconstitutional conditions cases."); Haskins, *supra* note 131, at 504–05 ("[T]he distinction is simply not relevant where the question is not whether the taking is 'fair,' but whether the taking is 'justly compensated.'").

unconstitutional conditions contains no indication that the doctrine—and, by extension, the heightened scrutiny represented by the twin decisions—should be applied to *any* particular breed of exactions.[136] Indeed, the only mention that Justice O'Connor makes of the character of an exaction is when she prefatorily notes that both decisions "involved Fifth Amendment takings challenges to adjudicative land-use exactions."[137] The application of the doctrine of unconstitutional conditions to *Nollan*/*Dolan* is not indicative of which exactions are suitable for heightened scrutiny; it merely pertains to the analysis of whether an exaction rises to the level of a taking once the determination has been made that the exaction in question merits *Nollan*/*Dolan* inquiry.

Also, as Matthew Baker points out, the Court's application of the unconstitutional conditions doctrine to *Nollan*/*Dolan* is simply duplicative of the test already elucidated by those decisions.[138] *Lingle* provides that, within the context of exactions, the doctrine of unconstitutional conditions mandates that "the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property."[139] Thus, the doctrine's requirement that the property forfeited bear a relationship with the permit granted by the government is simply a reiteration of *Nollan* and *Dolan*'s nexus and proportionality standard. *Lingle*'s "special application"[140] of the doctrine neither augments nor alters the existing *Nollan*/*Dolan* test.[141]

Consequently, contrary to scholars' arguments[142] that the substitution of the *Agins* formulation with the doctrine of unconstitutional conditions in the exactions context clarifies when the heightened scrutiny of *Nollan* and *Dolan* apply, the substitution actually offers no help to lower courts attempting to discern to which exactions the standard should apply. The Court's demurral on providing guidance on the takings evaluation of exactions creates a void that is logically filled by the balancing test that this Comment advocates.

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136. *Lingle*, 544 U.S. at 546–48.

137. *Id.* at 546.

138. Baker, *supra* note 114, at 196 ("[T]he *Nollan*/*Dolan* test *is* the unconstitutional conditions doctrine in the exactions context.") (emphasis in original).

139. *Lingle*, 544 U.S. at 547.

140. *Id.*

141. "The doctrine simply has no power independent of the *Nollan*/*Dolan* formulation." Baker, *supra* note 114, at 196.

142. *See supra* note 118.

Accordingly, this Comment proposes that the much-maligned[143] muddle of exactions taking analysis be replaced by a balancing test that incorporates a consideration of whether the regulation's burden falls disproportionately on an individual or small group of citizens, and therefore merits heightened scrutiny, or whether the burden is borne by the public at large, which should yield the relaxed scrutiny of *Penn Central*.[144] This balancing test will, in effect, reformulate the legislative/adjudicative distinction, which has proven so inconsistent and troublesome in its application.[145] The test will treat an exaction as "legislative" based not upon its method of conception and implementation, but upon its scope. Consequently, an exaction imposed by a legislative body, such as a requirement that housing developments construct roads or throughways, will nonetheless be eligible for consideration under *Nollan*/*Dolan*, and an exaction imposed on an ad hoc basis could potentially be analyzed under *Penn Central.*

The notion that the legislative/adjudicative distinction be reconceived as an inquiry into the contours of a regulation's burden is consistent with the Court's opinions in *Nollan* and *Dolan*. In *Nollan*, while Justice Scalia's opinion did not explicitly reference the origin of the challenged regulation,[146] he identified the central issue for the purpose of takings analysis as whether "the Nollans were being singled out to bear the burden of California's attempt to remedy these problems, although they had not contributed to it more than other coastal landowners."[147] Although *Nollan* does not attempt to delineate a legislative/adjudicative distinction, it does emphasize that a land use regulation is unjustified if it asks an individual alone to contribute toward the public interest.[148]

Dolan also nods approvingly[149] at the Court's language in *Armstrong*. Chief Justice Rehnquist introduces *Dolan*'s challenge as a question of whether the "government [has] forc[ed] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[150] Chief Justice Rehnquist also introduces a legislative/adjudicative distinction, but in a manner that inquires beyond the mere method of implementation:

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143. *See supra* notes 5–8.

144. *See generally* Pa. Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

145. *See supra* notes 5–8.

146. *See supra* Part II.

147. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 835 n.4 (1987).

148. *Id.* at 841. "The Commission may be right that [the regulation] is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization." *Id.*

149. Justice Scalia also quotes the *Armstrong* language in *Nollan*. *Nollan*, 483 U.S. at 835 n.4 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

150. Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) (quoting *Armstrong*, 364 U.S. at 49).

> The sort of land use regulations discussed in the cases just cited, however, differ in two relevant particulars from the present case. First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel.[151]

Thus, Chief Justice Rehnquist tethers the identification of legislative and adjudicative land use regulations to the question not of the method of implementation, but of whether the regulation has singled out individual property owners for special treatment. This distinction makes a natural threshold inquiry for *Nollan*/*Dolan* treatment—it flags regulations that pose a heightened risk of violating the *Armstrong* principle and therefore should not merit the deference to legislative bodies that the Court has found desirable. Consequently, organizing a balancing test around the question of burden distribution is a workable way of identifying claims that are conducive to *Nollan*/*Dolan* analysis without stepping on the toes of legislative bodies. The proposition, advanced by some critics,[152] that all exactions be subjected to heightened scrutiny would unnecessarily sweep some legislatively imposed land use regulations into *Nollan*/*Dolan* examination that do not comport with the standard identified by Chief Justice Rehnquist in *Dolan*. In that proposed scenario, the increased *Nollan*/*Dolan* scrutiny would impede the government's ability to engage in widespread land-use planning by endangering "essentially legislative determinations classifying entire areas of the city,"[153] rather than legislative determinations that focus on a smaller number of properties.

This Comment's proposed balancing test is not, however, a purely mathematical inquiry into the number of property holders that would be burdened by a challenged regulation. A test that focuses exclusively on the degree of discretion exercised by the body that implemented the regulation ignores the fact that even if only a single property owner is affected by a particular decision, this "does not mean that in the future that decision will not have widespread community effects."[154] Also, an examination only of the number of owners affected would unnecessarily sweep relatively benign regulations into heightened scrutiny "because most local land use decisions, including exactions, must be tailored to fit an individual development at some point and, therefore, necessarily in-

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151. *Id.* at 385.

152. *See supra* note 131.

153. *Dolan*, 512 U.S. at 385.

154. Inna Reznik, Note, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard*,* 75 N.Y.U. L. REV. 242, 262 (2000).

volve a certain amount of discretion."[155] Adhering to this narrow threshold test would result in regulations being flagged for *Nollan*/*Dolan* analysis even when the regulations would not threaten to violate the *Armstrong* principle's concern with "forcing some people alone to bear public burdens"[156] that should be shared by the community.

To avoid an over-inclusive balancing test, a consideration not only of the number of landowners impacted, but also of the extent of the public benefit, should be included. Considering the degree of discretion against the breadth of the benefit mitigates some of the line-drawing issues that would plague a test that evaluated only the number of affected owners. Such a narrow test would necessarily require a court to "determine the point at which the burdened group no longer qualifies as discrete."[157] Without consideration of additional factors, this approach suggests that a simple numerical distinction could be used to eliminate the exactions muddle. Incorporating an analysis of the extent of the public burden more precisely addresses *Armstrong*'s concern about burdens that, "in all fairness and justice, should be borne by the public as a whole."[158] As the extent of a public burden wanes, the fairness interest in spreading the burden that serves would also be diminished. In such a scenario, there would exist a reduced interest in subjecting the pertinent regulation to heightened scrutiny. Whether *Nollan*/*Dolan* analysis would be appropriate would depend upon a comparison of the fairness interest with the number of owners affected. Thus, the balancing test would avoid the tendency toward using a fixed numerical cutoff of the number of burdened property owners to determine whether a regulation qualifies for heightened scrutiny.

V. THE BALANCING TEST APPLIED TO THE NINTH CIRCUIT'S HOLDING IN *MCCLUNG V. CITY OF SUMNER*

In *McClung*, the Ninth Circuit was presented with its first post-*Lingle* exactions challenge when a Washington State property owner challenged as an unconstitutional taking a municipal ordinance that required new developments to install storm pipes with a minimum diameter of twelve inches.[159]

155. Breemer, *supra* note 131, at 406.
156. Armstrong v. United States, 364 U.S. 40, 49 (1960).
157. Baker, *supra* note 114, at 192.
158. *Armstrong*, 364 U.S. at 49.
159. *See* McClung v. City of Sumner, 548 F.3d 1219 (9th Cir. 2008).

A. Background and Procedural Posture

During the early nineties, the City of Sumner was plagued by then-record flooding.[160] In response, the City adopted Ordinance 1603 in late 1993, which instituted a swath of stormwater management regulations and requirements, including the aforementioned mandate that new construction projects use pipes with a diameter of at least twelve inches.[161] Roughly six months after Ordinance 1603 was signed into law, the McClungs sought permission from the City to convert residential properties they had acquired during the eighties and early nineties into a sandwich shop and to pave the adjoining alley to use it for the store's parking.[162] In the course of discussing the potential development with the City, the parties discovered that the storm pipe that ran under the property was of a twelve-inch diameter for only four feet before switching to six inches for the remaining 350 feet.[163] The city engineer sent a letter to the McClungs proffering a deal to cure the Ordinance 1603 violation:

> To correct existing deficiencies, meet the needs of your development and satisfy the future requirements as outlined in the Storm Water Comprehensive plan, a 24-inch diameter storm drain is to be installed as a condition of development.
>
> As a developer, you are required to install a 12-inch storm drain as a minimum. My estimate shows the cost difference between a 12-inch and a 24-inch diameter pipe ranges from $7,200 to $7,500. To offset the cost of the oversizing to meet the City's Comprehensive Plan requirements, the City will waive the storm drainage General Facilities Charge, permit fees, plan review and inspection charges of the storm drainage systems for both the development and the Subway Shop.[164]

Following receipt of the engineer's letter, the McClungs incorporated a twenty-four-inch storm pipe into their plans for the development, which were approved, enabling the pipe to be installed in 1996.[165]

Two years later, the McClungs filed a complaint against the City, claiming a number of Washington state law violations.[166] After years of litigation, the McClungs were allowed to amend their complaint to in-

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160. *Id*. at 1222; Scott Sistek, *Record Flooding as Strong Storm Pushes into Northwest*, KOMONEWS.COM (Nov. 7, 2006), http://www.komonews.com/news/local/4583077.html.

161. Sumner, Wash., Ordinance 1603 (Sept. 7, 1993), *available at* http://sumner.fileprosite.com/Documents/DocumentList.aspx?ID=276.

162. *McClung*, 548 F.3d at 1222.

163. *Id*.

164. *Id.* at 1222–23 (alteration in original).

165. *Id.*

166. *Id*.

clude an allegation that the City's requirement that the storm pipe be upgraded effected a Fifth Amendment taking.[167] The United States District Court for the Western District of Washington evaluated the Ordinance's original twelve-inch requirement separately from the subsequent agreement to install a twenty-four-inch pipe in exchange for fee waivers.[168]

The court evaluated the Ordinance's twelve-inch requirement using the *Penn Central* framework, and found that the requirement did not constitute a taking.[169] The court subsequently determined that the agreement to install a twenty-four-inch pipe was not cognizable as a taking, but was a contract between the McClungs and the City.[170]

B. The Ninth Circuit's Analysis

The Ninth Circuit notes at the outset of its analysis that the issue of whether a legislatively imposed land-use exaction should be evaluated under the *Penn Central* or *Nollan*/*Dolan* framework is one of first impression for the court.[171]

The court sees Ordinance 1603 as plainly distinguished from the regulations at issue in *Nollan* and *Dolan*, and consequently as outside the scope of its analysis. Unlike the regulations in those two cases, Ordinance 1603 does not require "an individual, adjudicative decision";[172] rather, it is akin to the "legislative determinations classifying entire areas of the city"[173] that Chief Justice Rehnquist, in his *Dolan* opinion, suggested would not be subject to a *Nollan*/*Dolan* analysis. Additionally, and most crucially, Ordinance 1603 requires no relinquishment of rights in real property, unlike the adjudicative determinations in *Nollan* and *Dolan*, which conditioned development permits upon dedication of property.[174] The Ninth Circuit believes that extending *Nollan*/*Dolan* analysis to regulations such as Ordinance 1603 "would subject *any* regulation governing development to higher scrutiny and raise the concern of judicial interference with the exercise of local government police powers."[175]

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167. *Id*.

168. *Id*.

169. *Id.* (citing Tapps Brewing, Inc. v. City of Sumner, 482 F. Supp. 2d 1218, 1228–31 (W.D. Wash. 2007)).

170. *Id*. at 1231.

171. *Id*. at 1225.

172. *Id*. at 1227.

173. *Id*. (quoting Dolan v. City of Tigard, 512 U.S. 687 (1994)).

174. *Id*.

175. *Id*. at 1228.

C. Applying the Balancing Test to Ordinance 1603

In determining whether Ordinance 1603 is eligible for *Nollan*/*Dolan* evaluation, the Ninth Circuit fumbles toward an inquiry resembling the balancing test proposed by this Comment, yet ultimately rests upon a formal distinction between legislatively and adjudicatively imposed regulations. While the court quotes Chief Justice Rehnquist's articulation of the legislative/adjudicative distinction in *Dolan*,[176] which suggests that its decision incorporates an evaluation of Ordinance 1603 based upon *Dolan*'s non-formal conception of the distinction,[177] the court relies upon a two-prong test to determine that Ordinance 1603 should be evaluated under the *Penn Central* framework.[178] The court's test excludes any mention of the *Armstrong* principle—that the intent of takings jurisprudence is to bar the government from forcing select citizens to shoulder burdens that should be borne by the public at large.[179] Further, and the court does not attempt to evaluate the distribution and extent of the regulation's burden.[180]

While an application of the balancing test proposed by this Comment would similarly result in evaluating Ordinance 1603 under the *Penn Central* framework, it would not rely exclusively on the manner of implementation and the classification of the burden itself.[181] In the case of Ordinance 1603, the regulation was enacted to effect a substantial public

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176. *Id*. at 1227 (quoting *Dolan*, 512 U.S. at 385).

177. *See* discussion *supra* Part IV.

178. *McClung*, 548 F.3d at 1227. "Unlike *Nollan* and *Dolan*, the facts of this case involve neither an individual, adjudicative decision, nor the requirement that the McClungs relinquish rights in their real property." *Id.*

179. Armstrong v. United States, 364 U.S. 40, 49 (1960) (determining that underlying takings jurisprudence is an interest in "bar[ring] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole").

180. *See McClung*, 548 F.3d 1219.

181. The Ninth Circuit contends in *McClung* that *Nollan*/*Dolan* analysis is reserved only for regulations that constitute exactions. *See McClung*, 548 F.3d at 1227. This contention is supported by the Supreme Court's ruling in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). In that case, the Court held that it has "not extended the rough-proportionality test of *Dolan* beyond the special context of exactions—land-use decisions conditioning approval of development on the *dedication of property* to public use." *Id.* at 702 (emphasis added). Consequently, the question of whether a regulation is an exaction is a threshold inquiry, albeit one that is beyond the scope of this Comment. There is much imprecision regarding the term's use, and scholars have reached no consensus on a definition. *See, e.g.*, Mark Fenster, *Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions*, 58 HASTINGS L.J. 729, 775 n.7 (2007) ("I will use the general term 'exactions' to refer to all conditions on development, including the dedication of land, fees in lieu of dedication, or impact fees."); Needleman, *supra* note 133 at 1590 n.3 ("Development exactions may be defined as contributions to a governmental entity imposed as a condition precedent to approving the developer's project."). At least one article has referred to Ordinance 1603 as an exaction. *See* Burling & Owen, *supra* note 20, at 437 ("In *McClung v. City of Sumner*, the Court analyzed an exaction requirement whereby a landowner was required to upscale a water line.").

good that would serve the entire community.[182] Prior to the Ordinance's adoption, flooding in Sumner and surrounding areas had forced residents to evacuate during periods of heavy rainfall.[183] Consequently, the Ordinance benefitted the city's entire community. In applying the proposed balancing test, regulations that offer a widespread public benefit are at a heightened risk of violating the *Armstrong* principle by heaping upon select landowners a burden that should rightfully be borne by the public at large.[184]

Ordinance 1603, however, escapes *Nollan*/*Dolan* scrutiny by allocating the regulatory burden equally to "most new developments."[185] While Chief Justice Rehnquist's opinion in *Dolan* does not contemplate heightened scrutiny only for exactions that burden a single parcel or owner, it specifically holds out regulations that "classif[y] entire areas of [a] city" as representative of exactions to which the relaxed *Penn Central* standard would apply.[186] Ordinance 1603 offsets its vast public benefit by distributing the regulation's burden widely, thus escaping heightened scrutiny.

Application of the balancing test helps delineate between factors that are relevant for the threshold inquiry of whether a regulation should be evaluated under heightened scrutiny, and those that pertain to the inquiry of whether a taking has occurred. The imprecision of the Supreme Court's takings jurisprudence had led, in some courts, to the conflation of the threshold test with the takings question itself.[187] In evaluating Ordinance 1603, the Ninth Circuit improperly incorporates part of the *Nollan*/*Dolan* analysis into its consideration of whether to examine the

182. Sistek, *supra* note 160.

183. *Id.*

184. *See* discussion *supra* Part IV.

185. *McClung*, 548 F.3d at 1222.

186. Ordinance 1603 can be distinguished from "middle ground" cases such as *Parking Ass'n v. City of Atlanta*, which concerned an ordinance that required roughly 350 Atlanta parking lots to incorporate landscaped spaces equivalent to ten percent of the paved area, and to plant one tree for every eight parking spaces contained in the lot. 515 U.S. 1116 (1995) (Thomas, J., dissenting) (denying certiorari). Though more than a few landowners were burdened by the regulation, the burden included forfeited revenue from lost parking spaces, and in some cases, the trees would obscure signage on the lot and prevent owners from selling advertising. *Id.* at 1117–18 (Thomas, J., dissenting). Due to the extent of the burden placed upon a disproportionate few landowners, this case would present a closer call for the balancing test proposed.

187. Justice Thomas himself, in his dissent to the denial of certiorari in the *Parking Ass'n* case, wondered "why the existence of a taking should turn on the type of governmental entity responsible for the taking," and noted that "[a] city council can take property just as well as a planning commission can." 515 U.S. at 1118 (Thomas, J., dissenting). Though Justice Thomas is correct that the form of an exaction is not dispositive for the purposes of the takings inquiry, he makes the mistake of folding the legislative/adjudicative distinction into the takings question rather than the threshold determination. The distinction is relevant in determining whether to flag a regulation for heightened scrutiny, not in performing the takings analysis itself.

ordinance under heightened scrutiny. The court reasons that because new developments place an additional burden on the city's sewer system, requiring that new developments adhere to an expanded pipe diameter is not "a wholly unrelated interest."[188] In the court's mind, the connection between the burden and the public benefit supporting the regulation suggests relaxed scrutiny.[189] However, the question of whether a regulation's burden relates to the bestowed benefit is precisely the question imposed by *Nollan*. By incorporating that test as part of the threshold inquiry, the Ninth Circuit has taken the peculiar step of using *Nollan*'s test against itself, deflecting claims that might survive *Nollan* scrutiny from ever reaching it.

VI. CONCLUSION

Despite the recent efforts of the Supreme Court to provide a regime of takings jurisprudence that would produce a consistent, relatively uniform body of law from lower courts, the confusion and divergent outcomes that have characterized this area of law persist. This Comment proposes a test that would balance the various policy interests identified by the Court, such as preserving the government's ability to engage in land-use planning, while simultaneously serving judicial economy by efficiently flagging claims most suited for heightened scrutiny. This balancing test would preserve *Armstrong*'s interest in preventing the government from disproportionately heaping burdens on individuals to effect a widespread public benefit. By identifying only those regulations that run afoul of fairness principles, the test does not compromise the Court's stated interest in providing a measure of deference to legislative bodies. Instead, it provides a set of clear principles to guide lower courts that will imbue a neglected area of law with much-needed predictability and consistency.

188. *McClung*, 548 F.3d at 1225 n.3.
189. *Id.*